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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. — 73-963

DRAVO CORPORATION, S. J. GROVES & SONS CORPORATION and GUST K. NEWBERG CONSTRUCTION CO.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and BARNEY J. GRABIEC, DIRECTOR OF THE DEPARTMENT OF LABOR OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIFTH DISTRICT

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KEENAN PRINTING COMPANY

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIFTH DISTRICT

Petitioners, Dravo Corporation, S. J. Groves & Sons Company and Gust K. Newberg Construction Co., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois for the Fifth District entered March 14, 1973.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District is reported at 10 Ill. App. 3d 944. The Order of the Supreme Court of Illinois denying leave to appeal without opinion is unreported.

JURISDICTION

The judgment of the Appellate Court was entered March 14, 1973 and rehearing was denied April 24, 1973. Leave to appeal was denied by the Illinois Supreme Court on September 26, 1973, and on October 9, 1973 the mandate was stayed pending petition to this Court for writ of certiorari. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 USC 1257.

QUESTION PRESENTED

Is it a denial of due process of law for an Illinois State Court to entertain an action to declare property as being within the territorial jurisdiction of Illinois in order to support assessment of taxes on activities on said property where another State, Kentucky, actively makes claim to such property and the power to tax activities thereon as within its territorial jurisdiction where Kentucky (a) is not and cannot be made a party to the Illinois proceedings, (b) will not be bound thereby, and (c) is itself assessing taxes on the premise that the same land is in Kentucky?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 28 USC, § 1251. Original jurisdiction:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States."

STATEMENT OF THE CASE

Petitioners are General Contractors and have been awarded, as Joint Venturers, a construction contract by the U.S. Corps of Engineers, Department of the Army, in the amount of $85,000,000.00, for construction of a lock on an Island known as Dog Island in the Ohio River. Respondents, being the Illinois Attorney General, Director of Revenue and Commissioner of Unemployment Compensation, filed suit in an Illinois State Court shortly after the contract was awarded, alleging that Dog Island, the site of the work, was located in Illinois, and petitioners therefore were and would become liable for payment to the State of Illinois of unemployment

compensation contributions and income tax, and were also required to withhold and pay to Illinois taxes on income paid to employees of petitioners engaged in the construction work.

Petitioners had been informed by the Corps of Engineers that Dog Island was located in Kentucky, and upon notice to the State of Kentucky of the claims of Illinois, Petitioners were advised that Kentucky claimed jurisdiction of Dog Island and the power to assess taxes predicated upon activities thereon. These taxes included unemployment compensation contributions, use tax, income tax and withholding tax.

Petitioners herein moved to dismiss the complaint, which motion was supported by affidavit, averring that Dog Island was claimed by Kentucky to be within the territorial jurisdiction of Kentucky, and petitioners were alleged to be subject to Kentucky tax upon activities performed on the Island. Letters from certain Kentucky officials setting forth Kentucky's claims were attached to the affidavit.

Petitioners' motion to dismiss contended inter alia that (a) the controversy was in fact a controversy between Illinois and Kentucky which was within the exclusive jurisdiction of the Supreme Court of the United States, and (b) since the Illinois Court could not, by a decision that Dog Island was in Illinois, bind Kentucky and thus bar a Kentucky Court from finding that Dog Island was in Kentucky and Petitioners were liable for Kentucky taxes, it would be a denial of due process of law for the Illinois Court to proceed to determine the location of the Island and petitioners' tax liability. The Circuit Court of Pope County dismissed the complaint, expressly finding:

> "The Court finds that since the Court's order in this case could not bind the State of Kentucky, to proceed further would be a denial of due process of law."

The Appellate Court for the Fifth District reversed the trial court, holding that the Court should proceed to determine in which State Dog Island lies. The question presented herein was raised on appeal and directly passed upon by the Appellate Court. See Appendix A.

The Illinois Statutes involved are the Unemployment Compensation Act (Illinois Revised Statutes, 1971, Chapter 48, paragraphs 300-820) and the Income Tax Law (Illinois Revised Statutes, 1971, Chapter 120, paragraph 1-101, et seq.).

The Kentucky Statutes involved are the Income Tax Law (KRS 1972, 141.010-141.990) the Unemployment Compensation Law (KRS 1972, 341.005-341.990) and the Sales and Use Tax Act (KRS 1972, 139.010-139.990). Material portions of these statutes are reprinted in Appendix B.

A comparison of the Income Tax Statutes shows that the tests for allocating in State and out of State income are practically identical.[1] Each Statute sets up three factors: the property factor, the payroll factor and the sales factor, and the key language triggering the application of the Statute is: to the property factor, use of the property *in the State;* to the payroll factor, compensation

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1. The income tax imposed by each State is in the same form as that before this Court in *Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959), and no suggestion is made that the tax as such is constitutionally impermissible. However, this Court's comment there that "logically it is impossible, when the tax is fairly proportioned, to have the same income taxed twice" (p. 462) did not foresee the ingenuity of Illinois and Kentucky.

for services performed *in the State,* and to the sales factor, performance of the income producing activity *in the State.* Thus the incidence of the tax depends entirely on whether Dog Island is in Kentucky or in Illinois, The duty to withhold taxes from employees and remit them to the State also depends on whether the employment is within or without the State.

The payment of unemployment contributions also depends on whether employment is within the state.

Thus the obligation to pay income tax, the obligation to pay withholding tax and the obligation to pay unemployment contributions is entirely dependent on the location of the work.

ARGUMENT

I.

THE DECISION OF THE ILLINOIS APPELLATE COURT IS IN CLEAR CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN WESTERN UNION TELEGRAPH CO. VS. COMMONWEALTH OF PENNSYLVANIA, 368 U.S. 71, 82 S. CT. 199, 7 L. ED. 2d 139 (1961) AND RESULTS IN A CLEAR DENIAL OF PETITIONERS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Appellate Court's disregard of the principal enunciated by this Court in *Western Union* v. *Commonwealth of Pennsylvania*, 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 139 (1961) and other cases, places petitioners in a position where they may be forced, because of irreconcilable but independent State determinations of territorial jurisdiction over the location of the site of certain work, to pay millions of dollars in taxes to each of two States where the land, which as a matter of law controls the incident of the tax, can clearly lie only in one.

As indicated in the Statement of the Case, both Illinois and Kentucky have adopted various taxing statutes wherein the incidence of the tax arising out of construction activities depends entirely upon territorial jurisdiction over the land which is the site of the work. Each State claims that the Island upon which the work is being performed is in the State making claim thereto, and each State adamantly refuses to initiate an action in this Court for determination of the issue in a forum wherein

the real parties in interest, the two States, may be heard and the matter finally resolved. Indeed, each State has repaired to its own Courts seeking a determination that the land lies within that State, thus avoiding direct conflict with the real adversary and placing petitioners in a position where petitioners may be forced to pay taxes to each State in spite of the logically irrefutable fact that the land cannot be in both States.[2]

The Appellate Court, in the decision this Court is asked to review, holds that each State may constitutionally do this. This Court in *Western Union Telegraph Co.* v. *Commonwealth of Pennsylvania, supra,* has held that the States may *not* constitutionally do this.

Inasmuch as Western Union is on all fours, detailed analysis is appropriate. Pennsylvania and New York (as most States) have escheat laws providing that certain funds, if "property within" the particular State, are escheated to the State if unclaimed after passage of a stated period of time.

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2. Petitioners, during the pendencey of the Illinois proceedings, made payments of tax to Kentucky predicated on the fact that the construction contract indicated that the work was located in Kentucky. Since the decision of the Illinois Supreme Court denying leave to appeal, petitioners have felt constrained to withhold payments of tax pending action by this Court. Kentucky has followed the script indicated by Illinois and approved by the Illinois Appellate Court by commencing administrative actions for enforcement of the Unemployment Compensation Act and judicial action for enforcement of taxes claimed due to Kentucky. (Commonwealth of Kentucky v. Dravo Corp. et al, Franklin Circuit Court, No. 4398.) Taxes, as hereinbefore indicated, are predicated on the location of the Island in Kentucky.

Pennsylvania customers of Western Union had availed themselves of a particular service of Western Union where these customers deposited money in Pennsylvania offices for transfer to other States, including New York. In several instances the payees did not pick up the funds in the other State and in several of such instances Western Union was unable to make refund to the original sender. Pennsylvania sought to escheat undisbursed money held by Western Union arising out of money orders bought in Pennsylvania. Western Union defended on the grounds that these same funds could be and indeed had been claimed by other States, particularly New York, based on a variety of claimed jurisdictional bases. Western Union further argued that Pennsylvania's decision holding the money to be "property within Pennsylvania" could not protect Western Union from a decision of the Courts of other States holding the exact same funds to be "property within" the jurisdiction of the other States.

The United States Supreme Court said (p. 76):

> "We find it unnecessary to decide any of Western Union's contentions as to the adequacy of notice to and validity of service on the individual claimants by publication. For as we view these proceedings, there is a far more important question raised by this record—whether Pennsylvania had power at all to render a judgment of escheat which would bar New York or any other state from escheating this same property.
>
> "Pennsylvania does not claim and could not claim that the same debts or demands could be escheated by two states. See Standard Oil Co. v. New Jersey, 341 U.S. 428, 443, 95 L. Ed. 1078, 1090, 71 S. Ct. 822. And our prior opinions have recognized that when a state court's jurisdiction purports to be based, as here, on the presence of property within

the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. Anderson Nat. Bank v. Luckett, 321 U.S. 233, 242, 243, 88 L. Ed. 692, 702, 703, 64 S. Ct. 599, 151 ALR 824; Security Sav. Bank v. California, 263 U.S. 282, 286-290, 68 L. Ed. 301, 306-308, 44 S. Ct. 108, 31 ALR 391. *Applying that principle there can be no doubt that Western Union has been denied due process by the Pennsylvania judgment here unless the Pennsylvania courts had power to protect Western Union from any other claim including the claim of the State of New York that these obligations are property 'within' New York* and are therefore subject to escheat under its laws. But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party. Moreover, the potential multistate claims to the 'property' which is the subject of this escheat make it not unlikely that various States will claim in rem jurisdiction over it. Therefore, Western Union was not protected by the Pennsylvania judgment, for a state court judgment need not be given full faith and credit by other states as to parties or property not subject to the jurisdiction of the court that rendered it . . .

"But even if, as seems unlikely, no other state will assert such a claim, the active controversy between New York and Pennsylvania is enough in itself to justify Western Union's contention that to require it to pay this money to Pennsylvania before New York has had its full day in court might force Western Union to pay a single debt more than once and thus take its property without due process of law.

"Our Constitution has wisely provided a way in which controversies between states can be settled

without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law. Article 3 of § 2 of the Constitution gives this Court original jurisdiction of cases in which a state is a party. The situation here is in all material respects like that which caused us to take jurisdiction in Texas v. Florida, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563, 121 ALR 1179. There four states sought to collect death taxes out of an estate. The tax depended upon the domicile of the decedent, and this Court said that 'By the law of each state a decedent can have only a single domicile for purposes of death taxes. . . .' Id. 306 U.S. at 408. Thus, there was only one tax due to one state. The estate was sufficient to pay the tax of any one state, but the total of the claims of the four states greatly exceeded the net value of the estate. For this reason, as we said, the risk of loss to the state of domicile was real and substantial, unless we exercised our jurisdiction. Under these circumstances we exercised our original jurisdiction to avoid 'the risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty.' Id. 306 U.S. at 405. The rival state claimants here, as in Texas v. Florida, can invoke our original jurisdiction. . . .

". . . It is plain that Pennsylvania courts, with no power to bring other states before them, cannot give such hearings. They have not done so here; they have not attempted to do so. As a result, their judgments, which cannot, with the assurance that comes only from a full trial with all necessary parties present, protect Western Union from having to pay the same single obligation twice, cannot stand. When this situation developed, the Pennsylvania courts should have dismissed the case." (Emphasis supplied).

The Supreme Court of the United States, in *Pennsylvania* v. *New York,* 407 U.S. 206, 92 S. Ct. 2075, 32 L.

Ed. 2d 693, the case in which it exercised original jurisdiction over the dispute brought before it as an original action as a consequence of its decision in *Western Union*, characterized its original *Western Union* decision very succinctly:

> ". . . the State Court judgment denied Western Union due process of law because it could not protect the company against rival claims of other States." (p. 209)

As indicated above the result of the Appellate Court's decision will be to subject petitioners to the possibility of each State finding Dog Island to be located in the particular State and assessing taxes against petitioners on that basis, which is the very result the Supreme Court has held to be violative of due process.

The Appellate Court's entire decision is based on its misconception of the issue in the case, which is made apparent from the very first line of the Appellate Court's decision, which is: "The question in this appeal is, literally, where is Dog Island?" In no way is the issue the actual physical location of Dog Island. Petitioners, contrary to the assertion of the Appellate Court with reference to petitioners' motion, do not contend that Dog Island is part of Kentucky or part of Illinois. On the contrary, petitioners' position simply is:

1. Both the States of Illinois and Kentucky claim jurisdiction of Dog Island upon which work is being performed by petitioners, and seek taxes from petitioners based upon the Island being in such States.

2. Neither the Illinois Courts, the Kentucky Courts nor any Court in the United States, other than the Supreme Court of the United States, can obtain jurisdiction

over Illinois and Kentucky to resolve the controversy on this issue.

3. As a necessary corollary to the above, Illinois, if permitted to proceed, cannot adjudicate the rights of Kentucky so as to prevent assertion of liability against petitioners by Kentucky on the grounds that the land lies in Kentucky. Thus Ilinois may assess taxes against petitioners on the basis that the land lies in Illinois, and Kentucky may simultaneously assess taxes against petitioners on the basis that the land lies in Kentucky.

4. Since the Illinois Court cannot protect petitioners from the risk set out in the foregoing paragraph, it is a denial of due process to proceed with the case and subject petitioners to the aforesaid risk.

Thus we emphasize that the location of Dog Island as such is not the issue; rather, the issue is can Illinois protect petitioners from a decision by each State that Dog Island lies in that respective State thus making petitioners subject to unconstitutional double taxation upon the same item in each State?

The Appellate Court underscored its misconception of the issue by its reliance on *Durfee* v. *Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186. *Durfee* v. *Duke* was a case where there was a dispute between two non-sovereign litigants, a Nebraska plaintiff and a Missouri defendant, over title to certain land. Defendant claimed title, that the land was in Missouri and that the Nebraska Court lacked jurisdiction because the land was in Missouri. The Nebraska Court rejected all these contentions and was upheld by the State Court of Appeals. Subsequently, the Missouri defendant sued the Nebraska plaintiff in a Missouri Court and sought to avoid the res judicata

effect of the Nebraska judgment by reiteration of its argument that the land was in Missouri and that the Nebraska Court therefore lacked jurisdiction. The U.S. Supreme Court held that full faith and credit required recognition of the Nebraska judgment, holding that "once the matter has been fully litigated and judicially determined", it cannot be "retried in another State in litigation *between the same parties.*" (p. 115) (Emphasis supplied).

The Court went further saying (p. 115):

> "It is to be emphasized that all that was ultimately determined in Nebraska litigation was title to the land in question as between the parties to the litigation there. Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to their respective sovereignty over the land in question . . . Either State may at any time protect its interest by initiating independent judicial proceedings here."

Thus *Durfee* v. *Duke* was a case where *all* claimants of interest were before the Nebraska Court enabling full litigation of the issue with the resultant res judicata effect.

If this was a suit in Illinois between Smith and Brown, each of whom claimed title to Dog Island, a suggestion by Smith that the Island was in Kentucky would not oust Illinois of jurisdiction to determine where the land was, and the Illinois judgment would bar the loser from suing in Kentucky. But here the controversy is not between Smith and Brown, it is between Kentucky, Illinois and the petitioners. Kentucky is not and cannot be made a party, no court other than the Supreme Court of the

United States may obtain jurisdiction of all the parties in one action, and petitioners are subject to suit and possible defeat by each State in each State's own Courts.

As further authority for its decision the Appellate Court relied on *Standard Oil Co.* v. *State of New Jersey*, 341 U.S. 428, 95 L. ed. 1078, 71 S. Ct. 822. Astonishingly, the Appellate Court concluded that this decision was in conflict with the *Western Union* decision and, even more astonishingly, followed the *earlier* decision of *Standard Oil* rather than *Western Union*. Not only did the Appellate Court ignore the *Western Union* Court's explanation of why *Standard Oil* was inapplicable to the situation there (and here) presented, the Appellate Court ignored the language in *Standard Oil* showing the *Standard Oil* Court did not find *Standard Oil* in the position in which petitioners are placed. The Supreme Court said:

> ". . . The debts or demands represented by the stock and dividends having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands *against appellant* cannot be taken by another State.
>
> ". . . The claim of no other State to this property is before us and, of course, determination of any right of a claimant State *against New Jersey* for the property escheated by New Jersey must await presentation here." (p. 443) (Emphasis supplied).

Thus *Standard Oil* clearly states that the company will not be charged with double liability and the claim of any other State must proceed against New Jersey in the Supreme Court of the United States.

In this case Kentucky cannot be told to sue Illinois for the taxes if Illinois collects from petitioners as a result of an Illinois judgment. As the Appellate Court has recog-

nized in its opinion, the Illinois decision will not affect Kentucky and Kentucky will be free to pursue petitioners in the Kentucky courts, which is precisely the situation said to constitute a denial of due process in *Western Union*.

Lest it be suggested that the principle that it is a denial of due process to be subjected to possible double liability under the circumstances here presented must be limited to escheat cases, we refer the Court to *Texas* v. *Florida*, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563, wherein the Supreme Court of the United States took jurisdiction of a case involving State tax claims by several States which turned on the question of domicile to prevent "a loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims" (p. 407).

While the instant case, due to the tremendous amount of taxes involved, is of major importance to the parties, it is submitted that this Court's refusal to pass upon the question here presented may well encourage a multitude of similar State Court actions in the future as the United States proceeds to make use of its rivers for generation of power and harnessing the sometimes destructive forces of nature. Rivers bound many States, and while the boundaries are generally clearly stated, river action many times has the effect of drawing into question the physical location of actual boundaries from time to time. Indeed, this Court has been called upon innumerable times to resolve controversies of this exact nature. Illustrative of such cases is *Iowa* v. *Illinois*, 147 U.S. 1, 37 L. Ed. 55, 13 S. Ct. 239 (1892) where the Court said:

"The Mississippi river flows between the states of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two states; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two states *for the purposes of taxation* and other purposes of government." (Emphasis supplied). (p. 2)

If each State bordering a river is free to proceed in its own courts to determine its jurisdiction in river islands or a river bed, without obligation to make a contending State a party, contractors will be called upon to establish or resist establishment of territorial jurisdiction in actions where the contractor, an innocent party who is willing to pay his taxes (but only once), must bear the brunt of a dispute between the contesting States with a very real danger of being the loser in both States and thus being forced to pay double taxes. If such a danger exists it will bring a serious problem to the United States Government itself, for contractors must price into a contract those items which they cannot safely exclude.

In the instant case, if the petitioner had anticipated the possibility of paying taxes in both States, which is now a very real possibility, and had bid accordingly, the contract price would have far exceeded $85,000,000.00.

In the instant case, if the contending States were private parties, petitioners could join the rival claimants in a single action and simply make payment as a Court ultimately directed. The sovereign character of the adverse claimants, however, prevents petitioner from accomplishing this because of the Eleventh Amendment.

It is respectfully submitted that the principles of State sovereignty causing the adoption of the Eleventh Amend-

ment were not in any way intended to create the situation exemplified by this record, or that such principles would be in any way abrogated or nullified if this Court preserved to itself exclusive jurisdiction over the controversy shown herein, which is obviously the type of controversy between States which should be resolved by this Court. "Our constitution has wisely provided a way in which controversies between States can be settled without subjecting individuals and companies affected by those controversies to a deprivation of the right to due process of law." *Western Union, supra* (p. 77) This is a classic case for the invocation of this doctrine.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully pray that the Court issue its writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District, entered in this case.

Respectfully submitted,

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APPENDIX A

No. 72-92

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. WILLIAM J. SCOTT, Attorney General of the State of Illinois et al., *Plaintiffs-Appellants,* vs. DRAVO CORPORATION, a corporation et al., *Defendants-Appellees.*	Appeal from the Circuit Court of Pope County, Illinois. Hon. R. Gerald Trampe, Judge Presiding.

MR. JUSTICE JONES delivered the opinion of the court:

The question in this appeal is, literally, where is Dog Island?

Although the Illinois Constitution of 1970 is silent on the subject, article I of the Illinois Constitution of 1870 fixes the boundary line of Illinois with Kentucky along the Ohio River on its northwestern shore. When Virginia ceded to the United States the Northwest Territory, in the year 1784, she retained title to the bed of the Ohio River to the low-water mark on its north or northwest

side. When Kentucky became a State she succeeded to the rights of Virginia.

It is stated in *Joyce-Watkins Co.* v. *Industrial Commission*, 325 Ill. 378, 156 N.E. 346, that "The rule is that when a stream dividing coterminus States alters its channel by a gradual or imperceptible process of wear or alluvion the boundary shifts with the stream. Where a river is declared to be the boundary between States the river as it runs continues to be that boundary although it may have changed its course from natural causes by imperceptible wear, but if it suddenly changes its course or deserts its original channel the boundary remains in the middle of the deserted river bed. (Citations.) Considering the analogy of such a boundary line to one designated as "low-water mark," constituting the boundary between Illinois and Kentucky, we are of the opinion that in the absence of a showing of sudden or perceptible changes in the course of the river the low-water mark of the Ohio river as referred to in the designation of the boundary between Illinois and Kentucky is to be determined by the evidence as to the point to which the waters of that river have receded at its lowest stage."

In the case at hand complaint for declaratory judgment was filed in the circuit court of Pope County, Illinois by the People of the State of Illinois ex rel. William J. Scott, Attorney General, The Department of Revenue of the State of Illinois and Barney J. Grabiec, Director of the Department of Labor of the State of Illinois as plaintiffs against Dravo Corporation, a corporation, S. J. Groves & Sons Company, a corporation and Gust K. Newberg Construction Company, a corporation as defendants. The complaint recites that defendants have entered into con-

tracts with the Army Corps of Engineers to perform construction work on Dog Island, alleged to be in Pope County within the territorial limits of the State of Illinois. It further alleges that the boundary of the State of Illinois extends to a line which represents the low-water mark on the northwest shore of the Ohio River and the low-water mark has at times past and times relevant to determining the Illinois-Kentucky boundary been located such that Dog Island was not an island but rather was attached by dry land to the State of Illinois. By reason of the location of the construction work by defendants in the State of Illinois the defendants are required to comply with the laws of the State of Illinois, including the Illinois Income Tax Act and Unemployment Compensation Act. Plaintiffs have demanded defendants' compliance with those statutes but defendants have advised the plaintiffs that they consider Dog Island to be within the State of Kentucky and that therefore their work will be governed by the laws of Kentucky and they are not liable to comply with the Illinois Income Tax Act or Unemployment Compensation Act. The complaint prays a declaratory judgment that Dog Island is within the territorial limits of the State of Illinois and that defendants are required to comply with the Illinois Income Tax Act and Unemployment Compensation Act.

Defendants appeared together and filed a motion to dismiss the complaint upon the grounds, as pertinent to this appeal, (1) that Dog Island is part of and under the jurisdiction of the State of Kentucky which has not been made a party to the proceeding; (2) in view of the conflicting claims of jurisdiction over Dog Island a complete determination of the issues may not be had without the presence in the case of the State of Kentucky and it

is an indispensable party; (3) because of the controversy between the State of Illinois and the State of Kentucky the Supreme Court of the United States has exclusive jurisdiction of the case; and (4) inasmuch as the decision of the Illinois court in the present posture of the case cannot constitute a bar to proceedings by Kentucky in its courts for collection of Kentucky taxes, it would be a denial of defendants' rights to due process under the fourteenth amendment to the Constitution of the United States for the Illinois court to maintain or exercise jurisdiction in the matter. Attached to the motion to dismiss is an affidavit of an attorney for the defendants which states that the three defendants are a joint venture engaged in the performance of a contract for the United States Government in the Ohio River on an island known as Dog Island; that various departments of the State of Kentucky have contended that Dog Island is within the Commonwealth of Kentucky and the joint venturers are therefore subject to certain taxes imposed by said State as more fully appears from exhibits A and B attached. Exhibit A to the affidavit purports to be a letter from the Commissioner of Revenue of Kentucky addressed to the three defendants. The letter states in essence that it has come to the attention of the department that the defendants are engaged in a joint venture on the Ohio River in the vicinity of Dog Island located near Smithland; since Kentucky has jurisdiction over the Ohio River to the low-water mark on the northern shore defendants will be liable for sales and use taxes on tangible personal property used and consumed in the construction operations and for the withholding of income tax on salaries paid to employees while engaged in the project and for corporation income taxes on profits from the operation.

Exhibit B to the affidavit purports to be a letter from the General Counsel of the Bureau of Employment Security of Kentucky. It is addressed to an attorney for the defendants and notifies him that Kentucky claims the defendants will be subject to unemployment insurance tax on wages paid to employees in the construction of the Ohio River dam at or near what is know as "Dog Allen" near Smithland, Kentucky. The letter also claims that "Dog Allen" is south of the Ohio River low-water mark of the river's northwest shore and consequently is a part of the Sovereign Commonwealth of Kentucky and has been recognized as such since the border line was established. The letters described as exhibits A and B are both dated almost a month after the filing of the complaint.

After argument on the motion the trial court entered an order dismissing plaintiffs' complaint. The only finding in the order was as follows:

> "The Court finds that since the Court's Order in this case could not bind the State of Kentucky, to proceed further would be a denial of due process of law."

Plaintiffs appeal. We reverse.

The issue here, as in the court below, revolves around the associated questions of the judicial jurisdiction of the Illinois court over the cause of action as alleged in plaintiffs' complaint and whether the defendants will be deprived of due process of law as guaranteed in the fourteenth amendment to the United States Constitution if the case is permitted to proceed in the State Court.

This suit is by the State of Illinois against three corporations with which it has a close affinity, one is char-

tered in Illinois and two possess certificates of authority to conduct business in Illinois. The applicable statute grants the latter two the same rights and privileges as domestic corporations and subjects them to the same duties, restrictions, penalties and liabilities. (Ill. Rev. Stat., ch. 32, sec. 157.103.) The action, then, is essentially one between a State and its corporate citizens. There is no question of notice and opportunity for hearing.

Defendants' principal reliance is placed upon the case of *Western Union Telegraph Company* v. *Commonwealth of Pennsylvania*, 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139. In that case the State of Pennsylvania, proceeding in its State court, sought to escheat certain obligations of Western Union, consisting of unclaimed telegraphic money orders and the like. The unclaimed monies were alleged to be properties within Pennsylvania. By reason of the unclaimed money orders large sums of money due from Western Union to the payees of those money orders had accumulated in the company's offices and bank accounts throughout the country. Pennsylvania's complaint was directed specifically against the amount of undispersed money held by Western Union arising out of money orders bought in Pennsylvania offices to be transmitted to payees in Pennsylvania and other States, chiefly other States. Western Union was a New York corporation with its principal place of business in that State. It contested Pennsylvania's right to escheat the funds, urging that a judgment of escheat for Pennsylvania in its courts would not protect the company from multiple liability either in Pennsylvania or in other States. It argued that senders of money orders and holders of drafts would not be bound by the Pennsylvania judgment because service by publication did not give the State court jurisdiction. The

Supreme Court declined consideration of the adequacy of notice and validity of service on the individual claimants by publication, rather, they found a far more important question raised by the record—whether Pennsylvania had power at all to render a judgment of escheat which would bar New York or any other State from escheating the same property. They noted that their prior opinions have recognized that when a State court's jurisdiction purports to be based on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. Upon applying that principle the court held that Western Union had been denied due process by the Pennsylvania judgment unless the Pennsylvania courts had power to protect Western Union from any other claim, including the claim of the State of New York; that the obligations are property "within" New York and are therefore subject to escheat under its laws. Since New York was not a party to the proceeding in the State court and could not have been made a party, Western Union was not protected by the Pennsylvania judgment, because a State court judgment need not be given full faith and credit by other States as to parties and property not subject to the jurisdiction of the court that rendered it. The court's opinion was apparently in some conflict with its holding in *Standard Oil Co.* v. *State of New Jersey*, 341 U.S. 428, 71 S. Ct. 822, where it said that "The debts or demands * * * having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands against appellant cannot be taken by another state.

The Full Faith and Credit Clause bars any such double escheat." But that case was distinguished because an actual controversy between States was found to exist in the Western Union case, as demonstrated by the fact that the State of New York was present and participated in the case before the Supreme Court as *amicus curiae* and had, in fact, already escheated some of the funds sought by Pennsylvania. The court concluded by stating that multiple claims of power to escheat should be considered only when all interested States—along with all other claimants—can be afforded a full hearing. Since the Pennsylvania courts, with no power to bring other States before them, cannot give such hearing their judgments cannot protect Western Union from having to pay the same obligation twice and such judgment therefore cannot stand.

Defendants align the case before us with *Western Union Telegraph Co.* contending that since Kentucky is not and cannot be a party in the Illinois court, Kentucky need not accord full faith and credit to the Illinois judgment and will be free to pursue remedies in its own courts. Accordingly, the argument runs, defendants will be subjected to taxation by two States for the same activity and thereby deprived of due process of law.

The plaintiffs, for their part, rely upon the case of *Durfee* v. *Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186. In that case the petitioners, in 1956, brought an action against the respondent in a Nebraska court to quiet title to certain bottom land situated on the Missouri River. The main channel of that river forms the boundary between the States of Nebraska and Missouri. The Nebraska court had jurisdiction over the subject

matter of the controversy only if the land in question was in Nebraska. Whether the land was Nebraska land depended entirely upon a factual question—whether a shift in the river's course had been caused by avulsion or accretion. The respendent appeared in the Nebraska court and through counsel fully litigated the issues, explicitly contesting the court's jurisdiction over the subject matter of the controversy. After a hearing the court found the issues in favor of the petitioners and ordered that title to the land be quieted in them. Upon appeal the Supreme Court of Nebraska affirmed. The State Supreme Court specifically found that the rule of avulsion was applicable, that the land in question was in Nebraska, that the Nebraska courts therefore had jurisdiction of the subject matter of the litigation, and that title to the land was in the petitioners. Two months later the respondent filed a suit against the petitioners in a Missouri court to quiet title to the same land. Her complaint alleged that the land was in Missouri. The suit was removed to a Federal District Court by reason of diversity of citizenship. The District Court after hearing evidence expressed the view that the land was in Misouri, but held that all the issues had been adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was *res judicata* and "is now binding upon this court." The Court of Appeals reversed, holding that the District Court was not required to give full faith and credit to the Nebraska judgment, and that normal *res judicata* principles were not applicable because the controversy involved land and a court in Missouri was therefore free to retry the question of the Nebraska court's jurisdiction over the subject matter. The Supreme Court granted *certiorari*, reversed the judgment of the Court of Appeals and affirmed the

judgment of the District Court. The court noted that the full faith and credit clause of the constitution generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. To the respondents contention that the Federal Court in Missouri was free independently to determine whether the Nebraska court in fact had jurisdiction over the subject matter, i.e., whether the land in question was actually in Missouri, the court stated that while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of the Supreme Court have carefully delineated the permissible scope of such an inquiry. "From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." This rule was held to be applicable to questions of jurisdiction over the person, as well as jurisdiction over the subject matter and would also apply to a case involving real property. It was argued that an exception to a rule of judicial finality should be made in cases involving real property because of the Supreme Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to effect title to land in other States. This was rejected with the statement: "But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.'"

The court in *Durfee* went on to emphasize that all that was determined in the Nebraska litigation was title to the land in question as between the parties to the litigation there. They note that nothing there decided, and nothing that could be decided in litigation between the same parties in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them or as to their respective sovereignty over the land in question. Either State may at any time protect its interest by initiating independent judicial proceedings in the Supreme Court.

We see no need here for devoting effort to the definition of judicial jurisdiction or due process of law. The generally understood meanings and applications of those terms will suffice for this appeal.

In our view, the real issue that emerges is essentially factual. The issues here are closely aligned with those in *Durfee* v. *Duke* and we deem the principles applied in that case controlling rather than those in *Western Union Telegraph Company* v. *Commonwealth of Pennsylvania*. Upon which side of the boundary line between the States of Illinois and Kentucky does Dog Island lie? If in Illinois, then the circuit court of Pope County does have jurisdiction and the defendants, having had notice and opportunity to appear and defend, will not be deprived of due process if the case proceeds in that court. If it is determined that it lies in Kentucky, then the Illinois court would be without judicial jurisdiction to render a valid judgment since jurisdiction of Illinois courts cannot constitutionally extend beyond its own boundaries.

It is so distinctly clear as to require no citation of authority that only the parties to a case will be bound

by any judgment order that may ensue from litigation. This is pointedly so with respect to any interest that is now or may be claimed by the State of Kentucky. That State is not a party. The complaint of the plaintiffs does not involve Kentucky in any way. The defendants cannot avoid their prospective liability to the State of Illinois by saying only that they might be liable to Kentucky for the same types of taxes imposed on the same activity described in plaintiffs' complaint. Yet, this is essentially their position here. Such an assertion on their part is not sufficient to deny an Illinois court the right to inquire into its judicial jurisdiction over the subject matter here. The allegation of the complaint is that Dog Island is, and has been at all times pertinent to the case, a part of Illinois. It is a question of fact and accordingly demanding of proof. Defendants' motion to dismiss admits the location of Dog Island as the complaint alleges it to be. The affidavit and exhibits A and B thereto attached are insufficient to refute the complaint. The affidavit states only that various departments of the State of Kentucky have claimed that Dog Island is in Kentucky and defendants are subject to its taxes. The exhibit A letter claims notice that defendants are engaged in a joint venture in the "vicinity" of Dog Island and that Kentucky claims jurisdiction to the low-water mark on the northern shore of the Ohio River. The exhibit B letter notifies defendants that Kentucky claims defendants will be liable for taxation by it in the construction of the Ohio River dam "at or near what is known as Dog Allen." (sic) It also states that "Dog Allen" (sic) is south of the Ohio River low-water mark on the river's northwest shore and therefore a part of Kentucky.

The State of Ilinois is not seeking to tax property or activity in Kentucky, nor is it claiming the power to tax because of some incidence or connection with some activity in Kentucky. Rather, it is asserting judicial jurisdiction over activity wholly withn its own boundary. If the plaintiffs succeed in establishing as fact what they allege in their complaint, clearly they will be entitled to the relief they seek. Nothing appears at this juncture that will deprive the Illinois court of jurisdiction. Indisputably, the defendants will not be foreclosed from proof that, as a matter of fact, Dog Island is a part of Kentucky, and the Illinois court is accordingly without jurisdiction to render a valid judgment. But the Illinois court, under the rules of judicial jurisdiction and *res judicata* discussed in the *Durfee* case, may receive evidence regarding the location of Dog Island with reference to the State boundary line, and therefrom make a determination of its jurisdiction.

We do not see this action as an intrusion into the exclusive jurisdiction over disputes between States conferred upon the Supreme Court by article III, section 2 of the Constitution of the United States. There is no legal dispute with respect to the location of the Illinois-Kentucky boundary. The two States are not in contention here nor are the issues tendered in the complaint sufficient to engage them in controversy. The State of Illinois cannot in this proceeding divest Kentucky of its claim to territory nor can it change the existing boundary line. It is not attempting to do so.

The situation here is analogous to that in the case of *Joyce-Watkins Co.* v. *Industrial Commission* where the court met an argument similar to that of defendants' here

by saying: "We would not be justified in this proceeding, where the State of Illinois is not represented, to determine the boundary line between this State and the State of Kentucky. That question is of far too great importance to be heard without the appearance of the State. It is sufficient in this proceeding to determine whether or not the (Industrial) commission and the circuit court were justified in holding that Minley was within the jurisdiction of Illinois (at the time of an injury)." Like principles were also applied in *Uhlhorn* v. *U.S. Gypsum Company*, 366 F. 2d 211, where a contention was made that a tract of land in question was beyond the jurisdiction of the court because of a boundary change wrought by accretion in a river bed. Confronted with this argument the court held that the District Court had power to make a determination of its jurisdiction and the Circuit Court of Appeals would have jurisdiction to review the finding. The court said: " * * * the issues here do not involve the changing or establishing of the boundary line between sister states so that original jurisdiction lies with the Supreme Court of the United States. (Citation.) We simply decide the location of an established boundary. (Citations.)"

We cannot agree that this case bears a similarity to that of *Western Union Telegraph Company* v. *Commonwealth of Pennsylvania*. It is distinguishable not only on the basis of the parties involved but the subject matter as well. In the *Western Union Telegraph Company* case the subject matter was intangible personal property which a State sought to escheat. Once escheated the property would disappear with the result that Western Union could be left liable over to other claimants in other States and thereby deprived of its property without due process

of law. In contrast, whatever the outcome of this case, Dog Island, being realty, will doubtless remain intact and in place and the State of Kentucky will be free at any time to litigate any claims it may have respecting its boundary rights and territorial integrity.

Other matters raised by defendants in their motion to dismiss were not ruled upon by the trial court and accordingly we will not pass upon them here.

For the foregoing reasons we find that the defendants will not be deprived of due process of law if the case proceeds in the circuit court of Pope County, Illinois. Accordingly, the order of the circuit court of Pope County, Illinois dismissing plaintiffs' complaint is reversed and the cause remanded for further proceedings.

Reversed and remanded.

CONCUR: /s/ George J. Moran

CONCUR: /s/ Caswell J. Crebs

Publish in full.

APPENDIX B

ILLINOIS INCOME TAX ACT

C. 120 § 3—304. Because income of persons other than residents. (a) In general. The business income of a person other than a resident shall be allocated to this State if such person's business income is derived solely from this State. If a person other than a resident derives business income from this State and one or more other states, and, except as otherwise provided by this Section, such person's business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the sum of the property factor (if any), the payroll factor (if any) and the sales factor (if any), and the denominator of which is 3 reduced by the number of factors which have a denominator of zero.

(1) Property factor.

(A) The property factor is a fraction, the numerator of which is the average value of the person's real and tangible personal property owned or rented and used in the trade or business in this State during the taxable year and the denominator of which is the average value of all the person's real and tangible personal property owned or rented and used in the trade or business during the taxable year.

• • •

(2) Payroll factor.

(A) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the taxable year by the person for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

(B) Compensation is paid in this State, if:

(i) The individual's service is performed entirely within this State;

• • •

(3) Sales factor.

(A) The sales factor is a fraction, the numerator of which is the total sales of the person in this State during the taxable years, and the denominator of which is the total sales of the person everywhere during the taxable year.

• • •

(C) Sales, other than sales of tangible personal property, are in this State if:

(i) The income-producing activity is performed in this State; . . .

• • •

7—701. § 701.

ILLINOIS UNEMPLOYMENT COMPENSATION ACT

C. 48 § 317. Employment—Services included.] § 207. The term "employment" shall include an individual's entire service, within or both within and without this State, if

A. The service is localized in this State; . . .

• • •

KENTUCKY INCOME TAX LAW

KRS 141.120 Division of income of interstate business for tax purposes.

(9) All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

(a) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(b) The payroll factor is a fraction, the numerator of which is the total amount paid or payable in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid or payable everywhere during the tax period. Compensation is paid or payable in this state if:

1. The individual's service is performed entirely within the state; or

(c) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

3. Sales, other than sales of tangible personal property, are in this state if the income-producing activity is performed in this state; or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

KENTUCKY UNEMPLOYMENT COMPENSATION ACT

KRS 311.050. Covered employment.

(2) The term "covered employment" shall include:

(a) An individual's entire service, performed within, or both within and without, this state if the service is localized in this state. Service shall be deemed to be localized within a state if:

1. The service is performed entirely with such state . . .